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Supreme Court, U. S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term 1978

No. 78 - 5422

FEDERICO GONZALEZ,

Appellant,

v.

PEOPLE OF THE STATE OF NEW YORK,

Appellee,

On Appeal from the Supreme Court of the State of New York, Appellate Division, Second Department.

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MOTION TO DISMISS OR AFFIRM

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EUGENE GOLD
District Attorney
Kings County
210 Joralemon Street
Brooklyn, New York 11201

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BRIEF FOR APPELLEE

MOTION

Appellee in the above-entitled case moves to dismiss or affirm the judgment of the Supreme Court of the State of New York, Appellate Division, Second Department, on the ground that the question presented is so insubstantial as not to need any further argument.

QUESTION PRESENTED

Is an arrest warrant constitutionally required to enter premises, on which a suspect is lawfully present, for the purpose of effecting an arrest where there are exigent circumstances present and the police had no prior opportunity to obtain such a warrant for the particular crime for which the suspect is to be arrested?

STATE STATUTES INVOLVED

Section 140.10 (1) (b) of the New York Criminal Procedure Law provides that a police officer may arrest a person for a "crime when he has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise."

Section 140.15(4) provides: "In order to effect such an arrest, a police officer may enter premises in which he reasonably believes such person to be present, under the same circumstances and in the same manner as would be authorized, by the provisions of subdivisions four and five of section 120.80, if he were attempting to make such arrest pursuant to a warrant of arrest."

PROCEEDINGS BELOW

By Kings County Indictment Number 11682/1972, appellant herein was accused of Criminal Sale of a Dangerous Drug in the First Degree (formerly New York Penal Law § 220.44

[McKinney 1972]) and other related charges. Pursuant to a motion by appellant to suppress a quantity of cocaine seized at the time of his arrest, a suppression hearing was held by New York State Supreme Court Justice Paul D'Amaro on April 8-9, 1975. By a written opinion dated May 19, 1975, appellant's motion was denied. Thereafter, on June 10, 1975, appellant entered a plea of guilty to Criminal Possession of a Dangerous Drug in the Third Degree (formerly Penal Law § 220.20 [McKinney 1972]) in satisfaction of the entire indictment. Appellant was sentenced on July 30, 1975, to an indeterminate term of imprisonment of not more than five years.

Appellant's conviction was challenged in the New York State Supreme Court, Appellate Division, Second Department, on the ground that his arrest and the seizure of the drugs were made in violation of his rights under the Fourth and Fourteenth Amendments of the United States Constitution. The conviction was unanimously affirmed in a decision and order dated May 8, 1978. Leave to appeal to the New York Court of Appeals was denied on June 21, 1978, by Chief Judge Charles D. Breitel.

Thereafter, a motion was made by appellant in the Appellate Division for an order amending the remittitur of the Appellate Division to read that upon the appeal there was presented and necessarily passed upon a question under the Fourth and Fourteenth Amendments to the Constitution of the United States.

The motion was unanimously denied. A copy of the Court's decision denying the motion appears herein as Appendix A.

STATEMENT OF FACTS

The indictment arose from an undercover purchase of narcotics by Detective Saul Rodriguez of the New York City Police Department which took place during the early morning hours of December 14, 1972. Only minutes after the sale, appellant and two of his three accomplices were arrested when Detective Rodriguez, aided by his police back-up team, re-entered the premises where the sale had just occurred without an arrest warrant and seized narcotics found therein. The following testimony was elicited from the two witnesses to testify at the supression hearing:

For at least one year prior to December 14, 1972, Detective Rodriguez, acting in an undercover capacity, had regularly discussed and engaged in small purchases of narcotics from one Julio Tablas, a co-defendant of appellant. Thus, in October, 1972, the police began a field team narcotics operation by observing the encounters between Rodriguez and Tablas. Finally, arrangements were discussed between them for a large purchase of cocaine to be made on December 13, 1972.

At about 2:50 p.m. on that day, Detective Rodriguez was wired for sound and followed by his back-up team to the corner of Columbia and Union Streets in Brooklyn. There he encountered Tablas and discussed with him the purchase of approximately

five-eighths of one kilogram of cocaine. Tablas, however, informed the undercover officer that there would be a delay and directed him to return later.

Under the scrutiny of his field team, Rodriguez next met with Tablas at 5:00 p.m. At that time, Tablas, Carlotta Verges (another co-defendant), and Detective Rodriguez drove around the neighborhood until about 8:00 p.m. discussing the proposed buy. They agreed to meet again one hour later.

At 9:00 p.m., Detective Rodriguez arrived at 17 Woodhall Street as directed and was admitted. Present in the room were Tablas, Verges, Anthony Lugo (another co-defendant), and appellant who showed Detective Rodriguez a brown paper bag which appellant claimed contained an eighth of one kilogram of cocaine. Rodriquez, however, stated that was insufficient as he wanted to purchase a total of five-eighths of one kilogram. Appellant replied that he could get it but that it would take some time -- "about one hour and forty-five minutes." The undercover officer then left the apartment at about 10:20 p.m. and went back to his office.

At 12:15 a.m., Detective Rodriguez returned to the apartment as arranged. The requested cocaine was shown to the officer who then stated he would go outside to his car to get his money. Detective Rodriguez, however, was accompanied by Julio Tablas. Outside the apartment, Rodriguez signalled his back-up team that the sale had occurred and that they should follow him into the building to assist in the arrest. Upon

re-entering the building, Rodriguez shouted "Police" and attempted to arrest Tablas. A brief struggle ensued during which the officer's gun was fired.

Rodriguez and his fellow officers then proceeded up to the apartment and announced their presence. When no one inside responded, they gained entry by breaking down the door. Once inside the apartment, the police arrested appellant who was found standing over the toilet which had been flushed. Seized from the bottom of the toilet bowl was a paper bag containing the cocaine.

THE ISSUE PRESENTED BY THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION

The issue which appellant attempted to raise in the lower courts and presently is attempting to renew before this Court is whether the Fourth Amendment requires the police in the absence of exigent circumstances to obtain an arrest warrant before entering premises in which a suspect is lawfully present to effect the suspect's arrest. Admittedly, this might pose a substantial federal question as it is an issue to which this Court has alluded in several cases but has never expressly decided. See, e.g., United States v. Santana, 427 U.S. 38, 43-44 (1976) (White, J., concurring); Id. at 45 (Marshall, J., dissenting); United States v. Watson 423 U.S. 411, 418 n. 6 (1976); Gerstein v. Pugh, 420 U.S. 103, 113 n.

13 (1975); Coolidge v. New Hampshire, 403 U.S. 443, 480-481 (1971). Moreover, it is an issue which has left the various state and federal courts that have considered it in conflict. Compare United States v. Reed, 572 F.2d 412 (2d Cir. 1978), with United States ex rel Wright v. Woods, 432 F. 2d 1143 (7th Cir. 1970), cert. denied, 401 U.S. 966 (1971). Compare People v. Payton, 45 N.Y. 2d 300 (1978), with People v. Ramey, 16 Cal. 3d 263, 545 P. 2d 1333, cert. denied, 429 U.S. 929 (1976). However, the issue as framed by appellant is not truly presented by the facts of the instant case. Rather, the issue properly presented by this case is whether the police should be required to obtain an arrest warrant as soon as they have probable cause to arrest a suspect during an ongoing investigation where the arrest would be for a different, and less serious, crime than that being investigated. Appellee respectfully submits that there is no such requirement and that there is not a substantial federal question presented by this case meriting any further review by this Court.

The underlying rationale of appellant's legal thesis is that the police had probable cause to arrest appellant for Criminally Selling a Dangerous Drug in the Third Degree, a C felony (formerly Penal Law § 220.35) -- a less serious crime than that which was investigated and eventually charged against appellant -- as early as 9:00 p.m. on December 13, 1972, when Detective Rodriguez was offered for sale by appellant an eighth of one kilogram of cocaine. Therefore, appellant

argues, the police should have obtained an arrest warrant charging appellant with this lesser crime before returning to the apartment later evening.*

What appellant conveniently ignores is that the police did not have probable cause, and therefore could not have gotten an arrest warrant, for the actual prospective crime being investigated -- Criminally Selling a Dangerous Drug in the First Degree, an A felony (formerly Penal Law § 220.44) -- until the undercover officer returned to the apartment around midnight. At that point, there was not a sufficient opportunity to get a warrant as there were exigent circumstances present that necessitated the responsive action taken by the police, to wit: the destructive nature of the drugs left inside the apartment when the undercover officer left to notify his back-up team (Vale v. Louisiana, 399 U.S. 30, 35 [1971]; Johnson v. United States, 333 U.S. 10, 15 [1948]), and the firing of Detective Rodriguez's gun during the arrest of co-defendant Tablas which must have alerted the others including appellant inside the apartment to the presence of alien

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* It should be noted that the record below is absolutely barren of any evidence that an arrest warrant could have been obtained even during the period that appellant claims that the police had a duty to obtain such a warrant. Rodriguez did not leave the apartment until about 10:20 p.m. and returned by 12:15 a.m. After an allowance for travelling time to and from the apartment and time spent updating the field team, there would have been much less than two hours to obtain such a warrant.

interests (Warden v. Hayden, 387 U.S. 294, 297-298 [1967]).*

We submit that appellant's contention that the police were obligated to obtain an arrest warrant in this case because of their knowledge of appellant's illegal possession, and offer to sale, of a lesser quantity of drugs is wholly without merit. Appellant's argument when stripped to its necessary implications is that he had a right to be arrested for a crime before the culmination of an ongoing police investigation and fruition of the specific, more serious, crime being investigated -- a principle firmly denounced by this Court in United States v. Lovasco, 431 U.S. 783 (1977).

The inherent weakness in appellant's argument becomes apparent upon examination of the following hypothetical: Suppose Detective Rodriguez and his field team had gotten a warrant for appellant's arrest for his participation in the lesser offense but upon arrival at the apartment were informed that there would be another delay in the sale of the cocaine sought.** The police would then be confronted with two

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* It is important to note that appellant has not attempted to argue before this Court or below that the occurrences immediately preceding appellant's arrest were not exigent circumstances. Appellant has attempted to bypass this issue by maintaining -- erroneously, we believe -- that the police were obligated to obtain an arrest warrant before the undercover officer's return to the apartment which culminated in the sale of cocaine and appellant's arrest.

** There was testimony at the suppression hearing that one of the reasons why a warrant was not obtained was that the police were not sure that the sale would actually occur that night.

equally unsatisfactory options: 1) They could execute the arrest warrant thereby prematurely terminating the investigation before the case had ripened to the level for which the investigation was originally initiated, or 2) the officers could delay their arrest until the contemplated crime was completed -- if ever.

Appellee respectfully submits that requiring the police to follow the first of these alternatives would place a serious -- if not totally incapacitating -- restriction on police undercover investigations.* As stated by Mr. Justice Powell in his concurring opinion in United States v. Watson, supra at 831: "Good police practice often requires postponing an arrest, even after probable cause had been established, in order to place the suspect under surveillance or otherwise develop further evidence necessary to prove guilt to a jury."

The second alternative course would be equally unfavorable as it would require the officers to ignore the warrant -- a court order to effect the arrest. Moreover, appellant would probably then be heard to complain that the intentional delay of his arrest which resulted in more serious charges against appellant violated his right of due process under the Fifth and Fourteenth Amendments. See United States v. Marion, 404

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* The irrationality of appellant's position becomes even clearer when one realizes that the police had probable cause to arrest co-defendant Tablas long before December 14, 1972. Were the police required to obtain a warrant and effect an immediate arrest of Tablas they would never even have met appellant.

U.S. 307 (1971). Appellant cannot have it both ways. The police should be entitled to pursue their investigation to its maturity without having to choose between two such undesirable courses of action.

Thus, appellant has misconstrued the issue by raising the broad question of whether an arrest warrant is required to effect an arrest of one lawfully on private property. The issue actually presented by this case is whether the police needed to obtain an arrest warrant to re-enter the premises and arrest appellant after the completed sale of cocaine in light of the above-mentioned exigent circumstances existing at that time. This Court has repeatedly held that exigent circumstances will justify a warrantless entry into a private place to effect an otherwise lawful arrest. See, e.g., United States v. Santana, 427 U.S. 38 (1978); Coolidge v. New Hampshire 403 U.S. 443, 474-478(1971); Warden v. Hayden, 387 U.S. 294 (1966). No case by this Court has ever held or implied differently. Accordingly, when the issue is properly viewed from this perspective, the reasons for the Appellate Division's unanimous denial of appellant's motion for an amended remittitur become apparent as there was no substantial federal question needed to be reviewed in this case.

CONCLUSION

Wherefore, appellee respectfully submits that the question presented by this appeal is so unsubstantial as not to need any

further argument, and apellee respectfully moves the Court to dismiss the appeal or, in the alternative, to affirm the judgment of conviction.

Dated: Brooklyn, New York
October, 1978

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

PETER WEINSTEIN
Assistant District Attorney
On the Motion

APPENDIX A

No. 4791

The People, etc., respondent,
v Federico Gonzalez, appellant.

Motion by appellant to amend the remittitur of this court by amending its decision and order both dated May 8, 1978 so as to say that the court passed upon a certain question under the Constitution of the United States, in the consideration of his appeal from a judgment of the Supreme Court, Kings County, rendered July 30, 1975.

Motion denied.

SHAPIRO, J.P., COHALAN, MARGETT and O'CONNOR, JJ., concur.